

ALLIANCE BANK MALAYSIA BHD*a***v.****MOHAMAD YUSOF AMAT JAMLEE**

HIGH COURT SABAH & SARAWAK, TAWAU

b

LINTON ALBERT J

[SUIT NO: T22-19-2001]

29 SEPTEMBER 2005

LAND LAW: *Charge - Order for sale - Order for sale obtained - Unsuccessful auctions - Recovery of sum due from defendant to plaintiff - Cause of action - Whether a clause in the charge representing a covenant consistent with relevant provisions of Sabah Land Ordinance (Cap 68) - Whether concurrent remedy sought fell outside provisions of the Sabah Land Ordinance (Cap 68) - Whether ultra vires*

*c**d*

The defendant purchased a shophouse erected on a parcel of land ('the property'). The plaintiff granted a fixed loan facility of RM490,000 to the defendant to finance the purchase of the property which was charged to the plaintiff as security for the loan. The memorandum of charge was duly registered pursuant to the provisions of the Sabah Land Ordinance (Cap 68). The defendant had defaulted making the monthly payments and the plaintiff instituted proceedings and on 13 January 1999 successfully obtained an order for the sale of the property. However, subsequent auctions were not successful. By the time this action was commenced a sum of RM720,284.86 was due from the defendant to the plaintiff under the charge. The plaintiff's cause of action for the recovery of the said sum was expressed in cl.14 of the amended statement of claim where it was stated that 'cl. 46 of the annexure to the memorandum of charge allows the plaintiff to exercise the right to initiate this action simultaneously with the right to apply for sale of the property or any other rights available to the plaintiff and notwithstanding the said sale is pending as these rights are independent of each other.' The sole issue herein was whether cl. 46 representing a covenant in the charge was consistent with the relevant provisions of the Sabah Land Ordinance (Cap 68) pursuant to which the charge was registered.

*e**f**g***Held (dismissing the plaintiff's action):***h*

[1] The concurrent remedy the plaintiff sought in this action provided for by cl. 46 of the annexure in the charge fell outside the provisions of the Sabah Land Ordinance and the Land Rules. Clause 46 was *ultra vires* the Sabah Land Ordinance (Cap 68). (p 350 e-f)

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a Case(s) referred to:

Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 SC (**refd**)

Kimlin Houseing Development Sdn Bhd v. Bank Bumiputra (M) Bhd [1997] 3 CLJ 274 SC (**refd**)

Sime Bank Bhd v. Mohd Hassan Sulaiman [2000] 1 CLJ 546 HC (**refd**)

Standard Chartered Bank v. Mukah Singh [1996] 3 MLJ 240 (**refd**)

b *United Malayan Banking Corp Bhd v. Chong Bun Sun & Anor* [1994] 2 CLJ 673 HC (**refd**)**Legislation referred to:**

Land Ordinance (Cap 68) (Sabah), r. 14(16)

c *For the plaintiff - Mirdin Mamdin; M/s Chin, Mirdin & Co*

For the defendant - Natasha Sugumar Balakrishnan; M/s Sugumar & Co

Reported by Suhainah Wahiduddin

JUDGMENT**d Linton Albert J:**

The defendant purchased a shophouse at Lahad Datu erected on a parcel of land described as TL 117509136 (the property). The plaintiff granted a fixed loan facility of RM490,000 to the defendant to finance the purchase of the property which was charged to the plaintiff as security for the loan. The memorandum of charge was duly registered pursuant to the provisions of the Sabah Land Ordinance (Cap 68). Eventually after the defendant had defaulted in making the monthly repayments, the plaintiff instituted proceedings and on 13 January 1999 successfully obtained an order for the sale of the property but the subsequent auctions were not successful because there was no bidder for the property. By the time this action was commenced a sum of RM720,284.86 calculated up to 1 March 2001 was due from the defendant to the plaintiff under the charge. The plaintiff's cause of action for the recovery of the said sum is expressed in cls. 14 and 15 of the amended statement of claim which are reproduced:

g 14. Clause 46 of the annexure to the Memorandum of Charge allows the Plaintiff to exercise the right to initiate this action simultaneously with the right to apply for sale of the Property or any other rights available to the Plaintiff and notwithstanding the said sale is pending as these rights are independent of each other.

h 15. The Plaintiff will rely on the Offer and the Charge at the trial hereof for their full terms and effect.

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It is against the backdrop I have set out that the parties in this action have agreed that the sole issue to be determined is this: a

Whether Clause 46 of the Annexure Marked “A” in the Memorandum of Charge registered on 04.08.1997 is *ultra vires* the Memorandum of Charge registered pursuant to Section 104 of the Land Ordinance (Sabah Cap. 68) by reason of it being inconsistent and outside the scope and meaning of the Memorandum of Charge envisaged under Section 104 of the Land Ordinance (Sabah Cap 68)? b

Clause 46 of the annexure is as follows:

The right of the Bank to sue the Chorgor and/or the Customer and the guarantors, if any, are independent of, and in addition to the right of the Bank to apply for the sale of the Said Property and all other rights of the Bank herein reserved and the Bank may in its absolute discretion exercise all its right simultaneously notwithstanding that the sale of the Said Property is pending, and may at any time or from time to time discontinue or suspend any actions or proceedings as it may deem fit without prejudice to the prosecution of any other actions or proceedings, whether pending or otherwise. c
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Learned counsel for the plaintiff contends that cl. 46 is consonant with the charge. Heavy reliance is placed on *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332 where Eusoff Chin, SCJ delivering the grounds of judgment of the Supreme Court had this to say at p. 334: e

A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. f

The other authority cited by learned counsel is *United Malayan Banking Corp Bhd v. Chong Bun Sun & Anor* [1994] 2 CLJ 673 where Visu Sinnadurai, J held a similar view:

It is clear from these provisions of the NLC that the law confers a special statutory right on the chargee to obtain an order for sale. This right of the chargee is independent of any other causes of action which the chargee may have against the chargor under the charge, or under any other law. The remedy of the chargee to obtain an order for sale may therefore be described as a ‘statutory right’ conferred on the chargee by the NLC. g
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- a* The crux of the matter extends beyond the question whether cl. 46 is in harmony with the charge; more particularly, the issue is whether cl. 46 representing a covenant in the charge is consistent with the relevant provisions of the Sabah Land Ordinance (Cap 68) pursuant to which the charge is registered. The concurrent remedy the plaintiff is endowed with by virtue of
- b* cl. 46 can only be sustained if it is provided for by the Sabah Land Ordinance (Cap 68) and the Land Rules. In *Kimlin Houseing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors* [1997] 3 CLJ 274 Edgar Joseph Jr, FCJ delivering the judgment of the Supreme Court had this to say at p. 297:

- c* In our view, therefore, the provisions of the Code as to the rights of chargers are designed for their protection and cannot be waived; nor can the chargor contract himself out of the Code.

and at p. 299:

- d* In our view, the provisions of the Code setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are exhaustive and exclusive and any attempt at contracting out of those rights – unless expressly provided for in the Code – would be void as being contrary to public policy.

- e* In *United Malayan Banking Corp Bhd v. Chong Bun Sun (supra)* it was held that:

The NLC spells out in detail the powers of the court. These are statutory powers and the court cannot act beyond these powers. Any purported exercise of this power by granting a remedy not authorized by the NLC will be *ultra vires* the NLC, ...

- f* This is because the powers of the court to order sale by private treaty fall outside the provisions of the National Land Code, a proposition succinctly explained:

- g* So strict is this requirement, that s. 257(1)(a) does not provide for any other method of sale. In the face of this express provision, it would be a clear usurpation of the legislative function, if an order by way of private treaty is allowed.

- h* There are also other dangers when the court takes it upon itself to grant other remedies which are not expressly provided for by the NLC. An example of such an approach is the decision of the Federal Court in *Damodaran v. Vasudevan*, where the Federal Court gave recognition to *lis pendens* when it is not provided for in the NLC. This approach adopted by the Federal Court was subsequently the subject matter of much criticism by the Privy Council. Lord Diplock, in

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Damodaran v. Choe Kuan Him, a related case to that of *Damodaran v. Vasudevan* (where no appeal was brought to the Privy Council), in the course of his judgment, when called upon to invoke s. 417(1) of the NLC for purposes of registration of a *lis pendens* observed (at p 270):

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The National Land Code makes no provision for the registration of a *lis pendens*. Counsel ... has drawn their Lordship's attention to s. 417(1) of the National Land Code ... But this, in their Lordships' view, does not authorize the court to direct the registrar to make on the register entries of a kind of which no express provisions is made by the National Land Code and which are inconsistent with the whole scheme of the Act Lord Diplock further concluded (at p 270):

b

It follows that, in their Lordships' view, the entry on the register of an order of *lis pendens* is a mere *brutum fulmen*. Even if it be lawful to make such an entry at all, it serves no useful purpose and their Lordships would suggest that the precedent set by *Damodaran v. Vasudevan* [1975] 2 MLJ 231 is one which ought not to be followed.

c**d**

The relevant provisions of the Sabah Land Ordinance and the Land Rules applicable to the instant case are these:

Sections 104 and 111 of the Sabah Land Ordinance state:

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Section 104:

When any land is intended to be transferred or charged or sub-leased, the parties shall execute a memorandum substantially in one of the forms in Schedule XIII, XIV, XV, or XVI, with such variations as the Registrar may permit, which are necessary or desired and not inconsistent with anything in any Ordinance for the time being in force.

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Section 111:

If default be made in the payment of the principal sum, interest or periodical payment or any part thereof secured by a charge, or in the observance of any agreement expressed or implied in such charge, it shall be lawful for the Collector, on the application of the chargee and on being satisfied that such default has been made and has continued for the space of one month after the notice has been served by the chargee upon the chargor, in accordance with rules hereunder to order the sale by auction of the whole or any part of the land comprised in the charge.

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a Rule 14 is as follows:

If after hearing the application the Collector is satisfied that default has been made in any particular as aforesaid, and if no cause be shown to this satisfaction, he shall by order in the form of Schedule K determine the amount due under the charge and order the sale of the land charged or of such portion thereof as he may think fit, provided that no lot shall be partitioned without the consent of the chargor unless each subdivision shall contain five or more acres.

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Every such sale shall be by public auction and the auctioneer shall be nominated by the Collector, ...

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The purchase money arising from any such sale shall be applied firstly in the payment of any rent and fees due to the Government; secondly in payment of the expenses and costs of, and incidental to, the notices, summonses and sale; thirdly in payment of the moneys which may then be due or owing to the chargee; fourthly in payment of subsequent charges if any in the order of their priority, and the surplus if any shall be paid to the chargor or other person entitled thereto.

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Upon registration of any memorandum of transfer by, the Collector as aforesaid the land of the chargor therein transferred shall pass to and vest in the transferee freed and discharged from all liability on account of the charge in satisfaction whereof the land has been sold ...

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It is patently clear that the concurrent remedy the plaintiff seeks in this action provided for by cl. 46 of the annexure in the charge falls outside the provisions of the Sabah Land Ordinance and the Land Rules. It inevitably follows that cl. 46 is *ultra vires* the Sabah Land Ordinance and the question posed by agreement of the parties for determination accordingly answered in the affirmative. The plaintiff's predicament relating to the absence of any bidder for the property is of no consequence. In any event r. 14(16) provides as follows:

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When no sale has been affected the Collector may order the land to be again put up for auction on some future date, and may reduce the reserve price, if any.

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The proper and sensible approach should have been for the plaintiff to exercise caution and patience availing itself of r. 14(16) and wait for a successful sale of the property and if the proceeds are insufficient to satisfy the debt, proceed to recover the balance by commencing an action under the fixed loan facility as the plaintiff did successfully in *Standard Chartered Bank v. Mukah Singh* [1996] 3 MLJ 240. The plaintiff must therefore rue the consequences of being too hasty in resorting to the remedies it has accorded itself in the charge. Having said that I should add that I share the views expressed by Suriyadi, J in *Sime Bank Bhd v. Mohd. Hassan bin Sulaiman* [2000] 1 CLJ 546:

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It is universally accepted that lending institutions generally have the upper hand prior to the sealing of an agreement between consenting parties. *a*

Lending institutions invariably equip themselves by inserting a whole panoply of remedies in the documents borrowers are required to sign before loans are released to eliminate the risks against defaulting borrowers, as indeed they are entitled to, but sometimes, as here, to no avail. *b*

I have not alluded to the offer referred to in the amended statement of claim reproduced above because the terms thereof were subsumed under the charge and therefore irrelevant to the determination of this case. Contrary to what is argued for the defendant the question whether the annexure is part of or dehors the charge is also of no consequence. If, as alleged by the learned counsel for the plaintiff it is part of the charge, it is as I have explained *ultra vires* the Sabah Land Ordinance. On the other hand, if the annexure into which Clause 46 is inserted is a totally separate document outside the charge, it does not fall to be determined because the plaintiff's action is based on the charge and not on the annexure. Hence the question whether or not the registrar has authorised the inclusion of the annexure to the charge is equally irrelevant. In the circumstances the application of the doctrine of severability put forth by learned counsel for the plaintiff cannot conceivably achieve the result the plaintiff seeks. *c*
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The plaintiff's action is, for the reasons stated above, dismissed with costs to be taxed. *e*

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